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No. 05-1539

In The
# Supreme Court of the United States

JONAS EKLUND, et al.,

*Petitioners,*

vs.

BYRON UNION SCHOOL DISTRICT, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF AMERICAN CATHOLIC LAWYERS ASSOCIATION, INC., IN SUPPORT OF PETITIONERS

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## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2(b), the American Catholic Lawyers Association, Inc., respectfully moves this Court for leave to file the attached *amicus curiae* brief in support of the Petitioners, Jonas Eklund, et al. The consent of the attorneys for the Petitioner has been obtained. The consent of the attorneys for the Respondents was requested, but there has been no response to the request.

The American Catholic Lawyers Association, Inc. (ACLA) is a not-for-profit religious organization dedicated to the defense of the rights of Catholics in America, particularly in the area of First Amendment liberties. ACLA attorneys have represented Roman Catholic public school students and their parents in civil rights claims against public school authorities who have violated the Free Exercise and Establishment Clauses by promoting non-Christian religions in the public schools.

ACLA's *amicus curiae* brief argues that unless there is a double standard for application of this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and this Court's precedents on the Establishment Clause in the public school context, respondents' "interactive module" requiring impressionable public school students effectively to *become* Muslims cannot stand. ACLA further contends that this case presents an ideal vehicle for this Court to make it clear that the school cases apply with equal force to public

school promotion of any and all religions, not just Christianity.

Respectfully submitted,

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June 30, 2006

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## INTEREST OF *AMICUS*[1]

ACLA is a nonprofit religious organization dedicated to defending the religious and civil rights of Catholics by means of litigation, public discourse and debate. ACLA has engaged in religious liberties litigation on behalf of Catholic plaintiffs and defendants in courts across the nation, and has filed merits and/or *amicus* briefs in numerous venues, including the United States Supreme Court.

ACLA attorneys represented the successful (at the trial level) plaintiffs in the case of *Altman v. Bedford Central Sch. Dist*, 245 F.3d 49 (2d Cir. 2001), *cert. denied*, 534 U.S. 827 (2001), which the district court in this case has cited, and which raised issues quite similar to those presented here.

ACLA is gravely concerned about what it believes is a *de facto* double standard of Establishment Clause jurisprudence which has emerged in *Altman* and other similar cases, under which the overt promotion of non-Christian religions such as Islam and Hinduism in the public schools under the guise of "cultural education" is treated far more leniently than the merest suggestion of school promotion of the Christian religion.

ACLA believes that this case is the clearest example to date of promotion of a non-Christian religion by public school authorities, and that it presents an excellent vehicle to demonstrate that the strictures of the Establishment

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[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from the American Catholic Lawyers Association, Inc. (ACLA), its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLA has no parent corporation and no stock.

Clause in the public school arena apply equally to Christian and non-Christian creeds.

ACLA thus supports petitioners in their arguments for reversal of the Ninth Circuit's perfunctory unpublished opinion affirming the district court's dismissal of their claims concerning respondents' "interactive educational module," which engages impressionable students in the practices and tenets of Islam.

## SUMMARY OF ARGUMENT

The Excelsior School, a middle school in the respondent Byron Union School District, actively promoted and endorsed the religion of Islam by means of an "interactive educational module" whose aim could not be more explicitly contrary to the Establishment Clause: "From the beginning [of this module] you and your classmates *will become Muslims.*" ER 1934, 2299. The "module" involved nothing less than the school-sponsored immersion of impressionable students in the ways and beliefs of Islam.

A "module" whose aim was that the students "will become Catholics" would not have been tolerated for a moment in the public schools. Unless there is, in fact, a double standard in this area of constitutional law, the defendants' Islam "module" must be struck down, and the Ninth Circuit's decision reversed.

## ARGUMENT

## THE ESTABLISHMENT CLAUSE PROHIBITS PUBLIC SCHOOL PROMOTION OF "ISLAM LITE," AS WELL AS "ISLAM CLASSIC."

### A. The "endorsement" test.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court enunciated its classic three-part test for determining whether state action violates the Establishment Clause. The challenged state action must (1) "have a secular legislative purpose," (2) have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) "not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13.

In *Lynch v. Donnelly*, 465 U.S. 668, 688-693 (1984) (O'Connor, J., concurring), Justice O'Connor suggested that the second prong of the *Lemon* test, which looks to whether the challenged state action advances or inhibits religion, be formulated as an "endorsement test." Under this analysis, the challenged practice would be invalid if it has either the purpose or *effect* of communicating a message of government endorsement or disapproval of religion. *Id.* at 691-92.

Accordingly, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), this Court applied an endorsement test that "precludes government from conveying or *attempting to convey* a message that religion or a particular religious belief is favored or preferred," *id.* at 593, (internal quotations and citations omitted), or even "*appearing* to take a position on questions of religious belief." *Id.* at 594 (emphasis added, here and throughout this brief).

In reviewing the challenged school activities, this Court need look no further than the "endorsement" test. Respondents' immersion of students in the practices and tenets of Islam – but not those of any other religion – indubitably conveyed at least the appearance that "a particular religious belief is favored or preferred." *County of Allegheny*, 492 U.S. at 593. This is all the more so given the "impressionable youth" standard governing issues of state-sponsored religious endorsement in the classroom.

**B. The impressionable youth standard.**

The First Amendment mandates strict neutrality by state actors in the field of religion. *Gillette v. United States*, 401 U.S. 437, 452 (1971). Even "*subtle departures* from neutrality" are forbidden by the Establishment Clause. *Id.* at 452. Nowhere does this principle apply with greater force than in the public school classroom.

Where public schools filled with impressionable children are concerned, this Court has established a heightened level of scrutiny for state action alleged to violate this requirement of strict religious neutrality: "As we have observed before there are heightened concerns with protecting freedom of conscience from *subtle coercive pressure* in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The concept of "subtle coercive pressure" or "subtle and indirect pressure," *Lee*, 505 U.S. at 592-94, constitutes a separate and distinct test for Establishment Clause violations in the public school context.

This Court's "impressionable youth" standard was developed to address the salient fact that public school

students are, as this Court has observed, a captive audience:

> The State exerts great authority and coercive power through mandatory attendance requirements and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. . . . *In no activity of the State is it more vital to keep out divisive forces than in its schools.*

*Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

Accordingly, this Court has noted repeatedly that even the *risk* of an Establishment Clause violation in public schools warrants injunctive relief – *without proof of any actual proselytization* by school authorities. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 387 (1985) ("substantial risk" requires injunction), *overruled in part on other grounds*, *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) ("substantial risk"); *Meek v. Pittenger*, 421 U.S. 349, 369 (1975) ("potential").

The Ninth Circuit's one-paragraph unpublished opinion on the merits, which cites a lone and quite inapposite Ninth Circuit precedent, ducks the central issue in this case: Are the lower courts following a double standard for the application of this Court's Establishment Clause jurisprudence in the school cases? That is, are they applying the school cases to exclude only Christianity, but not other religions, from the classroom?

### C. The district court's novel theory allowing "Islam Lite" in the classroom.

The Ninth Circuit's opinion asserts, without the least analysis, that "The Islam program activities were not 'overt religious exercises' that raise Establishment Clause concerns." App. 1. That naked conclusion ignores the entire record in this case. As the district court's own opinion conceded, the express aim of the challenged activities in the "interactive educational module" at Excelsior School, as stated in the Student Guide, was that "[f]rom the beginning [of this module], *you and your classmates will become Muslims.*" ER 2534.

This undisputed fact alone mandates reversal. An elementary school curriculum in which students are told that they will *become* Muslims – even for "demonstration" or "role-playing" purposes – cannot possibly survive First Amendment scrutiny under either the "subtle coercive pressure" or the "endorsement" test enunciated in *Lee* and *Allegheny*, especially given the heightened scrutiny required by the impressionable youth standard.

If respondents had introduced an "interactive educational module" whose aim was that "you and your classmates will become *Catholics*," outraged non-Catholic parents and a battalion of ACLU lawyers would have rushed to the district court and sought injunctive relief, and the Ninth Circuit would most certainly have affirmed a grant of injunctive relief. There is only one explanation, therefore, for the result here: a double standard of Establishment Clause analysis.

Confronted with an insuperable Establishment Clause problem, the district court tried to navigate around it by reasoning that the undeniably religious activities in which

the school had embroiled children were only "simulations of Islam activities that were similar to, but not actual elements of, the Islamic faith. . . . [T]hese approximations of Islamic behavior cannot be considered actual 'religious activity' . . . " App. 20. In other words, the district court found that since the "module" required students to practice a sort of "Islam Lite" – a slimmed-down version of Islam for classroom purposes – the whole exercise could pass constitutional muster. The Ninth Circuit has affirmed this preposterous idea, albeit in an unpublished opinion clearly designed to deflect this Court's review.

The Ninth Circuit's affirmance of the district court rests entirely on an inapposite citation to its own opinion in *Brown v. Woodland Joint Unified School District*, 27 F.3d 1373, 1378 (9th Cir. 1994). But *Brown* involved nothing more than students reading about and discussing witches and making up some magical spells. These "were merely fantasy activities . . . that happen to resemble religious practices" of the Wiccan religion. *Id.* at 1382. Furthermore, the plaintiffs in *Brown* conceded that the authors-editors of the reading material "were unfamiliar with the religion of witchcraft" and were not intending to promote it. *Id.* at 1377. The classroom activity at issue thus had a mere "*coincidental resemblance* to a religious practice." *Id.* at 1381.

This case, however, does not involve a merely coincidental resemblance to Muslim religious practices, but rather *the deliberate and explicit curricular goal* that "you and your classmates will *become Muslims*." As the Ninth Circuit recognized in *Brown*, "active participation in 'ritual' poses a greater risk of violating the Establishment

Clause than does merely reading, discussing or thinking about religious texts." *Brown*, 27 F. 3d at 1380.[2]

The Ninth Circuit has ignored its own advice in *Brown*. The challenged activities were not, as the district court opined, mere "simulations of Islam activities," but rather *partially performed* Islamic practices and *partially learned* Islamic teachings. The "interactive educational module" undeniably embroiled impressionable students in learning *some* of the prayers Muslims learn, making *some* of the sacrifices Muslims make during Ramadan, learning *some* of the religious truths Muslims are required to know, and dressing and being known by Muslim names *some* of the time. The result was not "simulated Islam" but rather *a dabbling in real Islam* that is constitutionally indefensible in the public school context. *See* Petition, 3-12.

The district court seems to have been under the impression that the defendants were free to promote parts of Islam in order to stimulate interest in other religions as part of "cultural education." But as this Court noted in *Ball*, classroom activity that "increases respect for" or "helps stimulate interest" in a particular religion transgresses the Establishment Clause, even without overt proselytizing by teachers. *Ball*, 473 U.S. at 391-92 (citing Gianella, "Religious Liberty, Nonestablishment and Doctrinal Development," 81 Harv. L. Rev. 513, 574 (1968)).

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[2] In dicta, the *Brown* opinion suggested that having students reenact religious rituals such as the Last Supper or a Passover "*might* be permissible if presented for historical or cultural purposes." *Id.* at 1380. But this Court declined to reach the question, since the activities challenged in *Brown* were not explicitly religious. In this case, however, students were deliberately engaged in overtly religious activities in order to "become Muslims." No historical or cultural purpose could justify this immersion of students in the practices and tenets of Islam.

Moreover, it is crucial for application of the "endorsement" test that, as the district court itself conceded, no other religion was presented to Excelsior students in this "interactive" fashion. App. 20. The students were expected to "become" *only* Muslims. Thus, the Ninth Circuit has affirmed as religiously neutral an "educational" program in which impressionable youth in public school classrooms are required to partake of the tenets and practices of one – and only one – religion out of all the religions in the world. Yet there can be no question that the Ninth Circuit would have struck down an "interactive module" involving these Catholic analogues to the Islam "module":

- Take the confirmation name of a Catholic saint.
- Dress like a Catholic priest or nun.
- Wear nametags bearing the student's Catholic confirmation name and a crucifix bearing the Body of Christ.
- Memorize and repeat for the teacher the first verse of the Gospel of St. John: "In the beginning was the Word, and the Word was with God, and the Word was God," as well as other portions of the New Testament.
- Memorize the opening line of the Hail Mary – "Hail Mary, full of grace, the Lord is with Thee" – and repeat it for the teacher both in the classroom and upon exiting the classroom.
- Create banners stating "In the name of the Father, and of the Son, and of the Holy Ghost."

- Give up a lunch or engage in some other act of self-denial, and perform an act of charity, in keeping with a Catholic's Lenten obligations of fasting and almsgiving.
- Memorize religious sayings of Catholic saints, such as St. Augustine's "You have made us for yourself, and our hearts are restless until they rest in You."
- Make a virtual pilgrimage to Rome by playing a dice game and drawing cards containing Catholic teachings denominated as "truth" and "fact," such as: "The Holy Catholic Church was founded by Jesus Christ upon the Rock of Peter. **Fact.**"

When legal principles are applied inconsistently, law as such ceases to exist, and the courts become mere dispensers of *ad hoc* decisions tailored to the predilections of the day. The rule of law itself demands that the Ninth Circuit's double standard of Establishment Clause jurisprudence be corrected. Moreover, if this Court does not grant review, the jumble of *ad hoc* decisions in this area – motivated, it seems, by little more than the reigning political correctness – will continue to accumulate in the lower courts. There is no better vehicle than this case for the task of bringing consistency to the lower courts' application of this Court's Establishment Clause precedents in the school cases.

## CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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